

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 PAULETTE R. ZANDER,)
4)
5 Plaintiff,)
6 vs.)
7 TROPICANA ENTERTAINMENT, INC.,)
8 d/b/a TROPICANA ARUBA RESORT &)
9 CASINO; and DOES I through X; and ROES)
10 XI through XX, inclusive,)
11 Defendants.)

Case No.: 2:13-cv-00848-GMN-PAL

ORDER

11 Pending before the Court is the Motion to Dismiss (ECF No. 7) filed by Defendant
12 Tropicana Entertainment, Inc. ("Defendant"). Plaintiff Paulette Zander ("Plaintiff") filed a
13 Response (ECF No. 9) and Defendant filed a Reply (ECF No. 10). Subsequently, Defendant
14 also filed an Errata to its Reply. (ECF No. 11.)

15 I. BACKGROUND

16 This case arises from the injuries that Plaintiff experienced while visiting the Tropicana
17 Aruba Resort and Casino (the "Resort"). (Compl. ¶¶ 8-9, 13-14, ECF No. 1-1.) Specifically,
18 Plaintiff's Complaint alleges that, while exiting her vehicle at the Resort, "she tripped and fell
19 on a cement barrier that was placed parallel to the parking space." (Id. ¶ 9.) Plaintiff further
20 contends that "[t]here was insufficient lighting after sundown . . . to distinguish [the cement
21 barrier] . . . [and] [t]he barrier was not marked or painted to draw attention to the hazard." (Id.)
22 As a result, Plaintiff suffered "serious and permanent injuries," (id. ¶ 13), and was forced to
23 incur medical costs for treatment and hospitalization, (id. ¶ 14).

24 Thereafter, Plaintiff initiated this action in Nevada state court asserting three causes of
25 action (1) Negligence; (2) Res Ipsa Loquitur; and (3) Breach of Contract. (Id. ¶¶ 19-38.)
Defendant later removed the action to this Court, (Notice of Removal, ECF No. 1), and filed

1 the instant Motion to Dismiss (ECF No. 7). In its Motion, Defendant requests that this Court
2 dismiss Plaintiff’s Complaint because Defendant does not, as the Complaint asserts, “own[],
3 occup[y], operate[], control[], manage[], [or] maintain[]” the Resort at which Plaintiff
4 experienced the alleged injuries. (Compl. ¶ 7; see Mot. to Dismiss 3:7–12, ECF No. 7.)

5 **II. LEGAL STANDARD**

6 When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim,
7 dismissal is appropriate only when the complaint does not give the defendant fair notice of a
8 legally cognizable claim and the grounds on which it rests. See *Bell Atl. Corp. v. Twombly*, 550
9 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim, the
10 Court will take all material allegations as true and construe them in the light most favorable to
11 the plaintiff. See *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

12 “Generally, a district court may not consider any material beyond the pleadings in ruling
13 on a Rule 12(b)(6) motion However, material which is properly submitted as part of the
14 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard*
15 *Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly,
16 “documents whose contents are alleged in a complaint and whose authenticity no party
17 questions, but which are not physically attached to the pleading, may be considered in ruling on
18 a Rule 12(b)(6) motion to dismiss” without converting the motion to dismiss into a motion for
19 summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule
20 of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*
21 *Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers
22 materials outside of the pleadings, the motion to dismiss is converted into a motion for
23 summary judgment. See *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th
24 Cir. 2001).

1 **III. DISCUSSION**

2 Defendant bases its Motion to Dismiss Plaintiff’s Cause of Action for Negligence and
3 Plaintiff’s Cause of Action for Breach of Implied Contract on the assertion that Plaintiff
4 improperly named Defendant as a defendant in this case.

5 **A. Negligence**

6 To withstand a motion to dismiss, a claim for negligence must plead each of four
7 elements: (1) that defendant owed plaintiff a duty of care; (2) breach of that duty; (3) causation;
8 and (4) damages. *Turner v. Mandalay Sports Entm’t, LLC*, 180 P.3d 1172, 1175 (Nev. 2008).

9 In this case, Defendant asserts that it did not owe Plaintiff a duty because Defendant is
10 not the owner of the property at which Plaintiff suffered her injuries. Defendant’s argument
11 equates to a dispute over Plaintiff’s factual allegation that Defendant “owned, occupied,
12 operated, controlled, managed, maintained, and is therefore, responsible in all aspects for . . .
13 [the] TROPICANA ARUBA RESORT AND CASINO” (Compl. ¶ 7, ECF No. 1-1.)
14 However, a motion to dismiss is not the appropriate procedural vehicle to dispute the facts
15 alleged in a complaint. See *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination*
16 *Unit*, 507 U.S. 163, 164 (1993) (noting that, at the motion to dismiss stage of litigation, courts
17 must “accept as true all of the factual allegations in the complaint”); see also *Arpin*, 261 F.3d at
18 925 (noting that “extraneous evidence, [outside the complaint], should not be considered in
19 ruling on a motion to dismiss.”). Furthermore, Defendant has failed to provide any judicially
20 noticeable documents to support its position.

21 Because Defendant’s argument relies on evidence outside Plaintiff’s Complaint to
22 challenge the facts alleged in the Complaint, the Court concludes that Defendant’s Motion to
23 Dismiss fails and must be denied.¹

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25 ¹ To the extent Plaintiff’s Response to Defendant’s Motion to Dismiss attempts to amend its Complaint to allege
that Defendant is the alter ego of the Tropicana Aruba Resort and Casino, Plaintiff must do so in a Motion to
Amend that complies with Rule 15-1 of the Local Rules of Practice of the United States District Court for the

1 **B. Res Ipsa Loquitur**

2 Although not addressed in Defendant’s Motion, the Court will dismiss Plaintiff’s Second
3 Cause of Action entitled Res Ipsa Loquitur. See *Hearns v. San Bernardino Police Dep’t*, 530
4 F.3d 1124, 1129 (9th Cir. 2008) (“Federal Rule of Civil Procedure 41(b) authorizes a district
5 court to dismiss a complaint with prejudice for failure to comply with Rule 8(a).”).

6 “Res ipsa loquitur is an exception to the general negligence rule, and it permits a party to
7 infer negligence, as opposed to affirmatively proving it, when certain elements are met.” See
8 *Woosley v. State Farm Ins. Co.*, 18 P.3d 317, 321 (Nev. 2001). Thus, res ipsa loquitur is a
9 theory of liability or a method of establishing liability for negligence; it is not a separate cause
10 of action. For this reason, the Court concludes that Plaintiff’s Second Cause of Action does not
11 equate to a “short and plain statement of the claim showing that the pleader is entitled to relief”
12 and must be dismissed with prejudice. See Fed. R. Civ. P. 8(a)(2).

13 **C. Breach of Contract**

14 A claim for breach of contract must allege (1) the existence of a valid contract; (2) that
15 plaintiff performed or was excused from performance; (3) that the defendant breached the terms
16 of the contract; and (4) that the plaintiff was damaged as a result of the breach. See Restatement
17 (Second) of Contracts § 203 (2007); *Calloway v. City of Reno*, 993 P.2d 1259, 1263 (Nev.
18 2000) (“A breach of contract may be said to be a material failure of performance of a duty
19 arising under or imposed by agreement”). An enforceable contract requires: (1) an offer and
20 acceptance, (2) meeting of the minds, and (3) consideration. *May v. Anderson*, 119 P.3d 1254,
21 1257 (Nev. 2005).

22 As above, Defendant’s Motion to Dismiss Plaintiff’s Breach of Contract claim is also

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24 District of Nevada. See *Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003) (noting that a court may not
25 look beyond the complaint to plaintiff’s briefs when determining the propriety of a motion to dismiss for failure
to state a claim); *Ruiz v. Laguna*, No. 05-cv-1871, 2007 WL 1120350, at *26 (S.D. Cal. Mar. 28, 2007) (“It is
axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.”) (citation
and internal quotation marks omitted).

1 based on Defendant's disagreement with facts stated in the Complaint. For the same reasons
2 discussed above in Section III.A, the Court concludes that Defendant's Motion to Dismiss fails
3 and must be denied.


4 **IV. CONCLUSION**

5 **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss (ECF No. 7) is
6 **DENIED.**

7 **IT IS FURTHER ORDERED** that Plaintiff's Second Cause of Action for Res Ipsa
8 Loquitur is **DISMISSED with PREJUDICE.**

9 **DATED** this 26 day of February, 2014.

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Gloria M. Navarro, Chief Judge
United States District Judge